

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO	:	APPEAL NO. C-150620
	:	TRIAL NO. B-1206465
Plaintiff-Appellee,	:	
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
DAVID WALKER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

David Walker appeals his convictions for two counts of murder with gun specifications, aggravated robbery with gun specifications, and having weapons under a disability. He raises seven assignments of error. For the reasons that follow, we overrule each assignment of error and affirm the convictions and sentences.

First, Walker claims the trial court erred in overruling his motion to suppress the pretrial identifications by Geamayia and Cortez, two child witnesses. Walker contends the photo lineup was unduly suggestive and the procedures failed to comply with R.C. 2933.83. Both witnesses were shown sequential lineups by blind administrators who did not know the suspect's identity. The photographs were generated by a computer program, all of the photos shared similar physical characteristics, and both witnesses were read the statutory instructions. The procedures were not suggestive, so any unreliability went to the weight of the evidence. *State v. Neal*, 1st Dist. Hamilton No. C-140677, 2015-Ohio-4705 ¶ 28.

Next, Walker claims his confrontation rights were violated because the child witnesses testified via Skype, a closed circuit television system. Walker did not object to

the children testifying via Skype at trial. Therefore, we are limited to a review for plain error. *State v. Lukacs*, 188 Ohio App.3d 597, 2010-Ohio-2364, 936 N.E.2d 506, ¶ 31. The trial court did not commit plain error by allowing the children to testify via Skype due to public policy considerations. Additionally, the court employed sufficient procedures to ensure the reliability of the testimony. *See State v. Johnson*, 195 Ohio App.3d 59, 2011-Ohio-3143, 958 N.E.2d 977, ¶ 60 (1st Dist.).

Walker next argues the trial court erred by permitting other-acts evidence regarding his prior history of drug dealing with the victim, Larry Watkins, Jr. In this case, the evidence was admissible to show motive for the offense and the relevant background. *State v. Hill*, 37 Ohio App.3d 72, 74, 523 N.E.2d 894, (1st Dist.1984). Accordingly, the trial court did not err in admitting the testimony.

Walker also claims the trial court abused its discretion by allowing the state to introduce Watkins's statements as a dying declaration under Evid.R. 804(B)(2). At the time Watkins made the statements, he was mortally wounded by a gunshot to his back. He was lying in a hallway, unable to move, heavily bleeding, and gasping for air. Watkins apologized to his girlfriend for not attending church with her and asked God to watch over his children. Thus the record contains ample evidence to support the finding that Watkins believed his death was imminent, and his statements were properly admitted as a dying declaration. *See State v. Kennedy*, 1st Dist. Hamilton No. C-120337, 2013-Ohio-4221, ¶ 41.

Walker claims the prosecutor committed numerous instances of misconduct. Walker concedes he has waived all but plain error because he failed to object at trial. The discussion of the other-acts evidence and dying declaration was not misconduct because the evidence was properly admitted. Walker also asserts, without citing to the record for specific examples, that the prosecutor asked leading questions of the state's witnesses. Beyond this broad assertion, however, Walker does not analyze any specific questions asked, or how they prejudiced him. Consequently, we must

disregard this assignment of error pursuant to App.R.12(A)(2). *See State v. Rucker*, 1st Dist. Hamilton No. C-110082, 2012-Ohio-185, ¶ 32.

Finally, Walker alleges the prosecutor's remarks in closing argument improperly vouched for the credibility of the witnesses and denigrated the defense expert and counsel. The comment that the officers were "two of the best" was not improper and was supported by the record. The statement regarding Cortez's credibility was in response to defense counsel's argument that the witness was not credible, and a prosecutor may comment fairly on the credibility of a witness based on his in-court testimony. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996).

The prosecutor did not denigrate the expert by pointing out to the jury that he was paid for his testimony. However, referring to the witness as "Dr. Pay Me To Come In Here and I'll Con the Jury into Believing What I Need Them to Believe," and describing his testimony as "mumbo jumbo" was an improper opinion of the witness's credibility. *See State v. Fears*, 86 Ohio St.3d 329, 323-324, 715 N.E.2d 136 (1999). Based on the record before us, the isolated remarks made by the prosecutor did not prejudice Walker and do not constitute plain error. *See State v. Getsy*, 84 Ohio St.3d 180, 194, 702 N.E.2d 866 (1998). And the trial court properly instructed the jury that the statements of counsel are not evidence.

Walker asserts that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. Two eyewitnesses identified Walker, and one testified that he saw Walker shoot Watkins. Before he died, Watkins implicated Walker as his shooter. The trier of fact could have found all the elements proven beyond a reasonable doubt. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Reviewing the entire record, we cannot find the jury lost its way and committed such a miscarriage of justice that the convictions must be reversed. *Id.* at 387.

Walker claims the trial court erred by imposing multiple sentences on allied offenses. First, he claims that murder and aggravated robbery are allied offenses. Next, he claims that because the offenses merge, the gun specifications also merge.

Walker was convicted of aggravated robbery under R.C. 2911.01(A)(1) for attempting a theft offense and having a weapon under his control and either displaying, brandishing, or using it. The murder conviction was for causing the death of another as a proximate cause of the offender's attempt to commit an offense of violence. Under these facts, the offenses were committed separately. The aggravated robbery was complete when Walker brandished the gun and demanded the money. He was guilty of the robbery before he shot Watkins. *See State v. Curtis*, 1st Dist. Hamilton No.C-150174 , 2016-Ohio-1318, ¶ 30. Therefore, the offenses do not merge, and the gun specifications do not merge.

Accordingly, we overrule the assignments of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS AND MYERS, JJ.

Enter upon the journal of the court on April 28, 2017
per order of the court _____.

Presiding Judge